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Human rights situations that require the Council's attention

Written statement* submitted by the Jammu and Kashmir Council for Human Rights (JKCHR), a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[23 August 2018]

* Issued as received, in the language(s) of submission only.

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Please recycle

Indian administered Kashmir & use of courts to change demography

Human rights Council at its 39th session has the advantage of two reports - one by the United Nations High Commissioner for Human Rights and the other by the UN Secretary General. The first report is exclusively on "the Situation of Human Rights in Kashmir" and was presented to the 38th session of the Council and the second report is on "Children and armed conflict" presented to the 72nd session of General Assembly. The report by UN Secretary General came out on 16 May and the report by OHCHR came out on 14 June 2018.

OHCHR report has described the Human Rights violations in "Indian Administered Kashmir" in 15 sub-headings and human rights violations in "Pakistan Administered Kashmir" have been described under five sub-headings. Secretary General has described the "use of Kashmiri children as informants and spies by national security forces" of India.

After the long-forgotten two day visit of UN Secretary General Dag Hammarskjold, from 20-22 March 1959 to assess the Kashmir situation, these two reports emanating from Geneva and New York stations of UN are an important contribution in the service of human rights.

Council members need to know that since after the above two report by OHCHR and UN Secretary General, Indian Government, has encouraged, five Public Interest petitions in the Supreme Court, to consider scrapping a 91 year old law guaranteeing special rights to the citizens (State Subjects) of the disputed State of Jammu and Kashmir and make way for the settlement of non-Kashmiris in the State.

There is a collective feeling in Kashmir that radicals in India are behind these five petitions. They want to use the Supreme Court to change the demography of Kashmir. Indian Supreme Court has a dodgy record when it came to adjudicate matters involving Kashmiri Muslims. The Court has been overtaken by 'popular sentiment' and has wronged the administration of justice.

The Constitutional history of India starts from 1948 and the constitutional history of Kashmir dates back to 1934. The Constitutional Order 1954 which brought in article 35A itself is a nullity. It can't credit or wrong the 91 year old nationality law of the people of Kashmir. Supreme Court of India does not have a jurisdiction in the matter. Supreme Court of India is fettered by the UN Resolution of 30 March 1951.

The accession of 27 October 1947 has been surrendered by the Government of India at the UN Security Council on 15 January 1948 for a UN supervised vote. Indian Government and the Government of Jammu and Kashmir at Srinagar remain under the UN Security Council caution. The three components of the caution in the Security Council Resolution of 30 March 1951 read as:

(1) "..that the future of the State of Jammu and Kashmir shall be decided through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations.

(2) "that the area from which such a constituent assembly would be elected is only a part of the whole territory of Jammu and Kashmir.

(3) "..any action that assembly might attempt to take to determine the future shape and affiliation of the entire State or any part thereof would not constitute a disposition of the State in accordance with the above principle."

The common inference from this caution of March 1951, is that any Presidential Orders under Indian constitution or any actions by the Kashmir assembly after March 1951, would have no merit. President of India can't create an authority for himself over and above the UN package on Kashmir.

Article 370 introduced in 1950 has missed on the fact that Indian Government had surrendered the accession for a UN Supervised vote at the UN Security Council on 15 January 1948. Article 35A of Indian Constitution on State Subject Law and article 3 of the Constitution of Jammu and Kashmir, declaring "The State of Jammu and Kashmir as integral part of the Union of India" have no merit. Both these articles were introduced post March 1951 caution of the UN Security Council and the Indian assurances given at the UN Security Council.

The case in the Supreme Court is listed on 27th August 2018 and the people living in the Indian administered Kashmir, on the Pakistani side of cease fire line, the refugees living in the four provinces of Pakistan and the Kashmiri diaspora spread all over the world, are extremely concerned about this latest development. People living in the Indian administered Kashmir have been observing peaceful shut downs. Indian security forces, are likely to use force against the unwilling people and add to the loss of life.

It was on November 22, 1947 before the matter came at UN Security Council that Britain proposed, Kashmir to be referred to ICJ. United States of America made a serious effort on 27 August 1951 to take the case to ICJ. US document "Kashmir Dispute: Future Action" was prepared in consultation with the Foreign Office of Great Britain.

It is high time that Human Rights Council takes urgent steps to save lives in Kashmir and makes its input to ensure that the Human Rights of the people, in particular the regime of rights listed in the 21 April 1948 UN Security Council Resolution are honoured by Government of India and its security forces in Kashmir. JKCHR would like to invite the attention of the Council to para 18 in the Second Report submitted by Dr. Frank P Graham UN Representative for India and Pakistan, which reads:

"18. In its answer to the questionnaire the Government of India said* (paragraph 7), "it should be noticed that the Indian troops remaining in the State of Jammu and Kashmir at the end of the period of demilitarization under this plan are over 7,000 less than the minimum stated in paragraph 8 of the Prime Minister's letter of September 11th." (2nd Report by Graham Doc S/2448, 19 December 1951).

A comparative reading of para 18 of Dr. Graham's report of 19 December 1951 with para 40 of OHCHR report of 14 June 2018, highlights how India has used its military might in Kashmir. Para 40 reads:

"In 1990, India introduced the Armed Forces (Jammu and Kashmir) Special Powers Act (AFSPA) to manage groups that emerged by the end of the 1980s over objections to Indian control over Kashmir. A large number of Indian security forces were subsequently deployed to Kashmir with allegations of resulting serious human rights violations. Civil society and media often cite the figure of 500,000 to 700,000 troops which would make Kashmir one of the most militarised zones in the world."

JKCHR wishes to bring to the attention of the Council, NGOs, inter-governmental delegations, and National Institutions participating in the 39th session, that if five out of the six interest groups (sixth being India) listed by the United Kingdom at the 241st meeting of the UN Security Council on 5 February 1948, decide to regroup to fight the Indian presence (which has degenerated into an occupation) in Kashmir, it would be chaos all over. It will disturb every Kashmiri living in Pakistan administered Kashmir (Azad Kashmir), residents of Gilgit and Baltistan, refugees living in Pakistan, Kashmiri diaspora and their sympathisers.

Government of India has admitted at the 533rd meeting of the UN Security Council that, "So far as the Government of India is concerned, the constituent assembly is not intended to prejudice the issues before the security Council, or to come in its way." On 9 March 1951 at the 536th meeting of the UN Security Council the representative of the Government of India has stated that, "...provision was made in the Indian Constitution for a constituent assembly for settling the details of the Kashmir constitution. Will that assembly decide the question of accession? My government's view is that, while the constituent assembly may, if it so desires, express an opinion on this question, it can take no decision on it."

Indian representative was questioned at the 548th meeting of the UN Security Council on 29 May 1951 in regard to its position on the convening of a constituent assembly in Kashmir. Indian representative Mr. Dayal reiterated that, "Let me recall what Sir Benegal Rau stated to the Council on the subject of proposed constituent assembly in Kashmir. On 1 March 1951, he said {533rd meeting}, "So far as the Government of India is concerned, the constituent assembly is not intended to prejudice the issues before the security Council, or to come in its way."

Council needs to take notice that Supreme Court of India does not have a jurisdiction to interfere in defining the title of the State Subjects. Article 370 and article 35A of the Indian constitution have no merit since after 15 January 1948 when India surrendered the accession at the UN Security Council for a UN supervised vote and after the UN Security Council caution of 30 March 1951. There is a need to defend the jurisprudence of Kashmir case and argue that Indian Supreme Court would be Coram non judice in the matter.